

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCHERRILL TIM EARNEST,

Defendant-Appellant.

UNPUBLISHED

May 2, 1997

No. 189626

Recorder's Court

LC No. 94-012545-FH

Before: Sawyer, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver 50 to 224 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). He now appeals as of right. We affirm.

Defendant contends that the prosecution failed to present sufficient evidence to establish that he was in possession of the cocaine. When reviewing a trial court's ruling on a motion for a directed verdict, this Court must look to the evidence presented up to the time the motion was made. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). In determining whether the prosecution has presented sufficient evidence, this Court is required to view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Possession may be actual or constructive. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992). A person's presence, by itself, at a location where drugs are found is insufficient to establish constructive possession. Instead, some additional connection between the defendant and the contraband must be shown. Any one of various factors may be sufficient to establish construction possession. *Id.* at 520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 521.

In this case, the police raided a suspected crack house and discovered cocaine and other items related to the production and dissemination of cocaine. Defendant's fingerprint was found on a plastic bag containing 124.6 grams of cocaine. Following the raid, defendant was discovered along with

another individual crouched down behind a chimney on the roof of the house. Viewed in a light most favorable to the prosecution, we find that sufficient evidence existed to establish that defendant was in possession of 50 to 224 grams of cocaine.

Next, defendant contends that he is entitled to be resentenced because the trial judge did not recognize that she had the discretion to depart down from the mandatory minimum sentence. A defendant convicted of possession of a controlled substance is subject to a mandatory sentence of ten to twenty years in prison. MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). The trial court may depart from a mandatory minimum term of imprisonment if it finds on the record that there are substantial and compelling reasons to do so. MCL 333.7403(3); MSA 14.15(7403)(3); *People v Sanders*, 193 Mich App 128, 130; 483 NW2d 439 (1992).

In this case, the trial judge told defendant that she “must impose the mandatory sentence” and she indicated that she was “sorry to have to do it.” Given the context in which these statements were made, we do not agree that the trial judge failed to consider the possibility of a departure. At the beginning of the sentencing hearing, the prosecutor informed the court of its discretion and argued that defendant’s prior record did not warrant a sentence below the mandatory minimum. Thus, it would appear that the trial judge’s subsequent remarks did not evince a lack of recognition regarding the possibility of a downward departure. Rather, it appears that the trial judge simply believed that substantial and compelling reasons to warrant a deviation from the mandatory minimum did not exist.

Defendant next contends that the trial court abused its discretion in refusing to depart downward. We disagree. A finding of substantial and compelling circumstances should be the exception and not the rule and a departure from the mandatory minimum sentence is justified only in exceptional cases. *People v Fields*, 448 Mich 58, 68, 70, n 5; 528 NW2d 176 (1995). A determination that a departure is warranted must be based on objective and verifiable factors. *Id.* at 68. Sentencing courts are required to consider the following factors in determining whether a case presents substantial and compelling reasons to deviate from the mandatory minimum sentence: (1) the facts of the crime that mitigate the defendant’s culpability, (2) the defendant’s prior record, (3) the defendant’s age and (4) the defendant’s work history. *Id.* at 76-77.

In this case, defendant argues that a downward departure was warranted based on the fact that he was “27 years old and steadily, gainfully employed.” Although defendant had a job at the time of his conviction, the presentence investigation report indicates that he has had no “formal job training” and possesses no “job skills.” Moreover, defendant’s prior record is poor. The instant offense represents defendant’s third felony conviction. At the time of sentencing, defendant had three active misdemeanor warrants and one violation of probation warrant. In addition, he tested positive for “THC” in July of 1995. No mitigating circumstances existed which would have justified a downward departure. Accordingly, defendant is not entitled to be resentenced.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Mark J. Cavanagh